

9-1-2010

## Revisiting the Role of the Psychological Parent in the Dissolution of the Homosexual Relationship

Caroline L. Kinsey

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/bjglsp>



Part of the [Family Law Commons](#), and the [Sexuality and the Law Commons](#)

---

### Recommended Citation

Caroline L. Kinsey, *Revisiting the Role of the Psychological Parent in the Dissolution of the Homosexual Relationship*, 19 Buff. J. Gender L. & Soc. Pol'y 75 (2010).

Available at: <https://digitalcommons.law.buffalo.edu/bjglsp/vol19/iss1/4>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Journal of Gender, Law & Social Policy by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact [lawscholar@buffalo.edu](mailto:lawscholar@buffalo.edu).

# Revisiting the Role of the Psychological Parent in the Dissolution of the Homosexual Relationship\*

CAROLINE L. KINSEY†

## INTRODUCTION

Throughout the United States and across the world, homosexual couples have begun to raise children while residing as a single-family unit. Whether choosing to undergo in vitro fertilization,<sup>1</sup> gestational surrogacy,<sup>2</sup> adoption<sup>3</sup> or donor insemination, as of the year 2000, approximately “33% of female same-sex couple households and 22% of male same-sex couple households” consist of at least one child under the age of 18.<sup>4</sup> Although “millions of

---

\* This article was originally published as Caroline L. Kinsey, *The Role of the Psychological Parent in the Dissolution of the Homosexual Relationship*, 10 INT’L J. DISCRIMINATION & L. 133 (2009).

† Caroline L. Kinsey is a New York State and federal licensed attorney.

1. See Ramon Johnson, *Before Gay Men Choose Surrogacy Through In Vitro Fertilization (IVF)*, ABOUT.COM, <http://gaylife.about.com/od/gayparentingadoption/a/surrogacy.htm> (last visited Mar. 15, 2011) (defining in vitro fertilization as the “joining of a woman’s egg and a mans [sic] sperm...”).

2. See SURROGACY INFO MEDICAL TERMINOLOGY, <http://www.surrogacyinfo.com/medicalterms.html> (last visited Mar. 20, 2011) (“A gestational surrogate mother carries a baby that is genetically unrelated to her for another couple or person. The surrogate mother undergoes in-vitro fertilization to achieve pregnancy. In some states, the court recognizes gestational surrogacy and has clearly stated laws to define a gestational surrogate mother.”)

3. Adam P. Romero et al., THE WILLIAMS INSTITUTE, CENSUS SNAPSHOT: THE UNITED STATES, 1-2 (2007), <http://www.2.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf> (noting that as of December 2007 approximately 65,500 of the adopted children in the United States reside with gay or lesbian parents).

4. Ruth Ullman Paige, *Proceedings of the American Psychological Association, Incorporated, for the Legislative Year 2004*, 60 AM. PSYCHOLOGIST 436, 499 (2005).

lesbians and gay men have biological or adoptive children”<sup>5</sup> and approximately 270,313 children in the United States reside in households headed by same-sex couples,<sup>6</sup> courts remain hesitant to provide blanket protection to those families should dissolution of the homosexual relationship occur.

If a child’s parents do choose to separate, legal issues arise with respect to whether the non-legal co-parent may be considered the child’s legal parent under the term “other recognized grounds.”<sup>7</sup> Although non-legal homosexual parents retain the right to participate in a “second- parent” adoption process in several states,<sup>8</sup> this right is not uniform across the nation,<sup>9</sup> and as a consequence for failing to adopt their non-biological child, or not being legally permitted to

---

5. Kate Kendell, *Lesbian and Gay Parents in Child Custody and Visitation Disputes*, HUM. RTS. MAG. (Summer 2003), [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/irr\\_hr\\_summer03\\_custody.html](http://www.americanbar.org/publications/human_rights_magazine_home/irr_hr_summer03_custody.html).

6. Romero, et al., *supra* note 3 at 2. See also Paige, *supra* note 4, at 499; James Nash, *Kids Caught in Gay Splits-Inseminated Mother Disputes Ex-Partner’s Shared Custody*, THE COLUMBUS DISPATCH, May 24, 2010, [http://www.dispatch.com/live/content/local\\_news/stories/2010/05/24/kids-caught-in-gay-splits.html?sid=101](http://www.dispatch.com/live/content/local_news/stories/2010/05/24/kids-caught-in-gay-splits.html?sid=101) (stating in Ohio as of 2005, approximately 11,950 children reside in households headed by same-sex couples). Note this number has increased from 1999, of which the Gay and Lesbian Atlas reported approximately 250,000 children were being raised by same-sex couples. GARY GATES & JASON OST, THE GAY AND LESBIAN ATLAS (2004).

7. W.VA. CODE § 48-1-232 (2001) (Repl. Vol. 2004); see also Clifford K. v. Paul S., 619 S.E.2d 138 (W. Va. 2005).

8. Joanna Bunker Rohrbach, *Lesbian/Gay Family Dissolution*, 5 MAGAL NEWS: NEWSLETTER OF THE MASS. ASSOC. OF GUARDIANS AD LITEM 6 (Nov. 2000). As of 2010, approximately 17 states have established laws that explicitly allow same-sex couples to adopt, either through a second parent adoption or through stepparent adoption procedures. Second parent adoptions have also been awarded by trial courts in approximately twelve states. For a comprehensive list of these states, see *Adoption by LGBT Parents*, NAT’L CTR. FOR LESBIAN RTS, 2010, [http://www.nclrights.org/site/docserver/2pa\\_state\\_list.pdf?docid=3201](http://www.nclrights.org/site/docserver/2pa_state_list.pdf?docid=3201). Once a non-legal parent has adopted the child as a second parent, the original legal parent may no longer challenge the legal standing of that parent. See also, *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 539 (N.J. Super. Ct. App. Div. 1995).

9. *Gay Couple In Bitter Custody Battle*, CLICK ON DETROIT, Mar. 22, 2010, <http://www.clickondetroit.com/news/22912140/detail.html> (stating homosexual co-parents may not seek second parent adoption in Michigan).

do so,<sup>10</sup> gay and lesbian parents often find themselves without protection from the judicial system and may be prevented from asserting custody or visitation rights of the child in question.<sup>11</sup> While courts justify this custodial decision on the ground that it serves the best interests of the child and promotes stability and continuity within the family unit,<sup>12</sup> further inquiry demonstrates judicial hypocrisy in defining what is truly in the best interests of the child. In failing to recognize non-biological or non-adoptive parents as legal parents and destroying all ties between a child and the non-legal parent, courts use the best interests of the child standard merely as a guise for moral, religious and political agendas that further the best interests of society instead of the best interests of the child in question.

This essay evaluates child custody decisions made by state courts pertaining to the dissolution of homosexual partnerships. First, I elaborate upon the standards courts employ in arriving at custodial decisions. Second, I define the psychological parent doctrine and explore its wide application to homosexual parents. Third, I evaluate various state courts' interpretations of the doctrine with respect to homosexual couples, highlighting courts that have awarded custody and visitation rights to non-legal parents on the basis of psychological parentage and identifying courts that ruled to the contrary. I conclude by urging courts extend application of the psychological parent doctrine to homosexual co-parents under the term "other recognized grounds," and apply the four prong test outlined

---

10. See generally Robin Cheryl Miller, Annotation, *Child Custody and Visitation Rights Arising from Same-sex Relationship*, 80 A.L.R. 5th 1, §2[a] (2000). See also, *In re Adoption of Luke*, 640 N.W.2d 374, 378 (Neb. 2002); *In re Adoption of Doe*, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998); *In re Angel Lace M.*, 516 N.W.2d 678, 686 (Wis. 1994).

11. See generally Miller, *supra* note 10.

12. *Cox v. Cox*, 2000 ND 144, 613 N.W.2d 516, 521-22 ("When a psychological parent and a natural parent each seek a court-ordered award of custody, the natural parent's paramount right to custody must prevail unless the court determines it is necessary in the best interests of the child to award custody to the psychological parent to prevent serious detriment to the welfare of the child." (citing *Goter v. Goter*, 1997 ND 28, 559 N.W.2d 834)). See also *V.C. v. M.J.B.*, 748 A.2d 539, 539 (N.J. 2000); *Dehar v. Dehar*, 521 N.Y.S.2d 335, 336 (App. Div. 1987).

in *Holtzman v. Knott (In re Custody of H.S.H.-K)*,<sup>13</sup> to determine who may be considered a psychological parent in the eyes of the law. This argument relies largely in part on the core belief that state courts and legislatures must extend the legal rights and protections afforded to all heterosexual citizens to homosexual couples in a way uniform with our country's principles of equality, privacy and liberty, while respecting the interest of each individual state in supporting its children and maintaining stability of the ever-dynamic family unit.<sup>14</sup>

#### I. THE "LEGAL PARENT" AND "OTHER RECOGNIZED GROUNDS"

A non-legal parent must have standing before he is able to assert rights within child custody cases.<sup>15</sup> During disputes between homosexual co-parents, the initial inquiry is whether former partners in non-marital relationships are awarded child custody rights under the state's statutory scheme.<sup>16</sup> Once it has been determined whether a statutory scheme is applicable to the debate at hand, state courts may next look to whether the couple entered into a civil union or marriage legally recognizable by either the state where the pending custody matter is ensuing or the state where the union occurred. If the couple entered into a union outside the state where the custody agreement is being litigated, the custodial court has the right to either recognize that union and award automatic joint custody to the non-legal parent,<sup>17</sup> or hold the union invalid and apply the laws of the

---

13. *Holtzman v. Knott (In re Custody of H.S.H.-K)*, 533 N.W.2d 419, 421 (Wis. 1995) (establishing a four prong test which includes (1) the legal parent's fostering of the non-legal parent's relationship with the child; (2) the fact that the non-legal parent co-habited with the child; (3) the obligations assumed by the non-legal parent to care for the child; and (4) the formation of a bonded parent-child relationship between the non-legal parent and the child).

14. See generally *An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions and Domestic Partnerships* 2005 A.B.A. SEC. FAM. L. 8, 9, <http://www.americanbar.org/content/dam/aba/migrated/family/reports/WhitePaper.authchecked.am.pdf>.

15. *L.M.S. v. C.M.G.*, No. CN04-08601 2006 Del. Fam. Ct. LEXIS 298, at \*40-44 (Del. Fam. Ct. Jun. 26, 2006); *Chambers v. Chambers*, No. CN99-09493, 2002 WL 1940145 (Del. Fam. Ct. Feb. 5, 2002).

16. *Miller*, *supra* note 10, § 2 [b].

17. Jeremy Peters, *New York Court Expands Rights of Non-birth Parents in Same-Sex Relationship*, N.Y. TIMES, May 4, 2010, at A26 (referring to *In re*

state of the custodial court.<sup>18</sup> Further, if the parties entered into a written agreement that pertained to child custody prior to the dissolution of their relationship, the custodial court may either recognize or disregard that document at its discretion.<sup>19</sup>

Because the majority of state legislation is silent on whether custody may be awarded to homosexual couples after the dissolution of their relationship,<sup>20</sup> courts next look to whether the party is deemed a “legal parent” in the eyes of the law.<sup>21</sup> If the party is considered a legal parent, he or she will be permitted to assert standing within the child custody proceeding.<sup>22</sup> A party not found to be a legal parent by statute must turn to one or more equitable doctrines to assert rights within the custody dispute.<sup>23</sup> While courts have failed to generate a uniform decision on the definition

---

H.M. v. E.T., 881 N.Y.S.2d 113 (App. Div. 2009)). In 2010, the New York State Court of Appeals expanded the rights of homosexual co-parents by unanimously permitting a non-legal parent to seek visitation and custody rights of a child she co-parented with her former partner, due to the fact that the two had entered into a civil union in the state of Vermont that was legally recognizable by the State of New York. Note also that Florida will recognize any out of state judgment establishing legal parentage if custody is re-disputed in the state of Florida. See Cathy Sakimura, *Child Custody and Visitation Issues for Lesbian, Gay, Bisexual and Transgender Parents in Florida*, NAT'L CENTER FOR LESBIAN RTS. 2009 at 7, [www.nclrights.org/site/docserver/2007\\_10\\_02\\_FLCustodyPub.pdf?docid=2101](http://www.nclrights.org/site/docserver/2007_10_02_FLCustodyPub.pdf?docid=2101).

18. 28 U.S.C. § 1738A (2011).

19. *Rubano v. DiCenzo*, 759 A.2d 959, 959 (R.I. 2000) (enforcing a written agreement between the parties that awarded former same-sex partner visitation rights with the child the parties co-parented).

20. *Smith v. Gordon*, 968 A.2d 1, 2-3 (Del. 2009); *Kazmierazak v. Query*, 736 So.2d 106, 110 (Fla. Dist. Ct. App. 1999). See also *Smith v. Jones*, 868 N.E.2d 629 (Mass. App. Ct. 2007) (providing an example of a case which is silent on the issue).

21. See *Miller*, *supra* note 10, at § 2 [a].

22. *In re Marriage of Simmons*, 825 N.E.2d 303, 311-13 (Ill. App. Ct. 2005) (holding that the transsexual husband of an artificially inseminated woman did not have standing to assert custody rights because he was not a legal parent of the child, since Illinois does not recognize same-sex marriages); *In re Marriage of Wilson*, 110 P.3d 1106, 1108 (Or. Ct. App. 2005) (awarding the term ‘legal parent’ to natural and adoptive parents). *Clifford K. v. Paul S.*, 619 S.E.2d 138, 147 (W. Va. 2005).

23. *Miller*, *supra* note 10, at § 2.

of “legal parent,” most maintain a party must demonstrate one of three elements to receive legal status: (1) the party has a biological or presumed biological relationship with the child in question; (2) the party has formally adopted the child through judicially recognized proceedings; or (3) the party has been labeled the child’s parent on the basis of de facto parentage or other recognized grounds.<sup>24</sup>

Courts are split on whether former same sex partners are able to achieve standing in custody disputes under the term, “other recognized grounds.” Traditionally, the non-legal co-parent has failed to be awarded legal parent status under this standard.<sup>25</sup> Recently, however, courts have begun to apply the psychological parent doctrine to the relationship between the non-legal parent and the child.<sup>26</sup> In acknowledging this relationship, these courts maintain when the partner establishes he or she was the “psychological parent of the child . . . [or the] . . . relationship with the child was parent-like, the partner [is] entitled to consideration of [the] claim...and is not to be treated as a...third party.”<sup>27</sup> Moreover, jurisdictions such as Colorado, Indiana, Minnesota, Texas and the District of Columbia deviate from the traditional requirements for a non-legal parent to obtain standing in a determination of child custody, and instead abide by established criteria under which those other than biological parents achieve standing when initiating parental rights.<sup>28</sup>

---

24. *Smith v. Guest*, No. 252, 2011 WL 899550, at \*1 (Del. Mar. 14, 2011); *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010); *C.E.W. v. D.E.W.*, 2004 ME 43, 845 A.2d 1146; *Matter of Alison D. v. Virginia M.*, 77 N.E.2d 51 (N.Y. 1991) (recognizing only a child’s biological or adoptive parent has standing to seek visitation against the wishes of a custodial parent); *Clifford K.*, 619 S.E.2d at 148 (referencing elements laid out in a West Virginia statute); *Holtzman v. Knott (In re custody of H.S.H.-K)*, 533 N.W.2d 419, 421 (Wis. 1995).

25. *Clifford K.*, 619 S.E.2d at 151 (finding that lesbian partner was not “legal parent” of deceased partner’s child such that she had standing as a “legal parent” to seek custody of the party’s child).

26. *Gestl v. Frederick*, 754 A.2d 1087, 1101-1102 (Md. Ct. Spec. App. 2000).

27. *Miller*, *supra* note 10, at § 2 [a].

28. *Peters*, *supra* note 17, at A26 (referring to *Debra H. v. Janice R.*, 930 N.E.2d 184, 193 (N.Y. 2010)).

## II. THE ROLE OF THE PSYCHOLOGICAL PARENT IN DEFINING HOMOSEXUAL PARENTING

“The law does not recognize any absolute right in any person...to the custody of a child.”<sup>29</sup> In order to best ascertain why non-legal same-sex partners should be allowed to initiate a child custody proceeding and receive custodial rights, it is necessary to first understand the nature and scope of the psychological parent doctrine.

### A. Background

The concept of the psychological parent initially arose in the 1970's during custody disputes between husband and wife, natural parents and foster parents, or unfit parents and grandparents.<sup>30</sup> During one such custody dispute, a court mentioned, in dicta, that in “certain instances, psychological testimony may be relevant in aiding the determination of who should [be awarded] custody of a child.”<sup>31</sup> Although biological ties were the most important factor in determining an award of custody, courts began to state an individual may “be able to establish deprivation of a legally recognized right to maintain some type of continuing relationship with the child”<sup>32</sup> even though they bear no biological relationship to one another.

Also known as a “de facto” parent, or an individual receiving custody *in loco parentis*, the psychological parent is presently defined as one who “on a continuing and

---

29. *State ex rel. Lipscomb v. Joplin*, 47 S.E.2d 221, 225 (W. Va. 1948).

30. *Howard v. Gish*, 373 A.2d 1280 (Md. Ct. Spec. App. 1977); *Williams v. Miller*, 385 A.2d 992 (Pa. Super. Ct. 1978); Gary A. Debele, *Custody and Parenting by Persons Other Than Biological Parents: When Non-Traditional Family Law Collides With the Constitution*, 83 N.D. L. REV. 1227, 1242 (2007); Philip F. Schuster, *Constitutional and Family Law Implications of the Sleeper and Troxel Cases: A Denouement for Oregon's Psychological Parent Statute?*, 36 WILLAMETTE L. REV. 549, 573-77 (2000).

31. *State ex rel. McCartney v. Nuzum*, 248 S.E.2d 318, 320 n.3 (W. Va. 1978), overruled on other grounds by *In re Katie S.*, 479 S.E.2d 589 (W. Va. 1996).

32. *A.C. v. C.B.*, 829 P.2d 660, 665 (N.M. Ct. App. 1992).



regular basis, provides for a child's emotional and physical needs." <sup>33</sup>

Today, a party seeking to establish status as a psychological parent must meet three general requirements: (1) they must not be the child's legal parent; (2) they must have, with the consent of the child's legal parent, resided with the child within a significant period of time and; (3) they must have routinely performed at least an equal share of the caretaking functions with the child's primary caregiver without any expectation of compensation for the care.<sup>34</sup> These general factors are not exhaustive, and courts exercise discretion in adding additional factors to be considered in determining psychological parent status. Added factors courts have considered include whether: the non-legal parent attempted to maintain a relationship with the child post-separation;<sup>35</sup> the legal parent and the child developed a "close and loving relationship;"<sup>36</sup> a "parent-child bond [has been] forged"; the parties held themselves out to the world at large as a single family unit,<sup>37</sup> the amount of financial support the non-legal parent contributed to the support of the legal parent and child was significant;<sup>38</sup> the legal-parent and partner had a committed relationship prior to the conception or adoption of the child;<sup>39</sup> the child's surname reflected the non-legal partner's name;<sup>40</sup> the parties planned the pregnancy or adoption together.<sup>41</sup> While the importance level of each of these factors varies from state to state, courts across the nation are unanimous in maintaining the most significant indicia of a forged

---

33. BLACK'S LAW DICTIONARY 1145 (8th ed. 2004) ("[t]he psychological parent may be the biological parent, a foster parent, a guardian, a common-law parent, or some other person unrelated to the child").

34. *V.C. v. M.J.B.*, 748 A.2d 539, 551 (N.J. 2000).

35. *In re Hirenia C.*, 22 Cal. Rptr. 2d 443, 452 (Ct. App. 1993).

36. *Honaker v. Burnside*, 388 S.E.2d 322, 323 (W. Va. 1989).

37. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 893 (Mass. 1999); *V.C.*, 748 A.2d at 543; *A.F. v. D.L.P.*, 771 A.2d 692, 699 (N.J. Super. Ct. App. Div. 2001).

38. *E.N.O.*, 711 N.E.2d at 889, 892.

39. *Id.* at 830.

40. *Id.*

41. *Id.* at 889-89.

psychological parent-child relationship is the child's recognition of the non-legal party as that child's "parent."<sup>42</sup>

### B. *Application to Homosexual Co-Parents*

Once custody had been established between children and non-legal family members,<sup>43</sup> questions began to arise as to whether the concept of the psychological parent could extend to the dissolved homosexual relationship.<sup>44</sup> Initially courts responded in the negative, noting the psychological parent must be interpreted narrowly when deciding custodial arrangements.<sup>45</sup> This conservative approach was not followed by all jurisdictions, and slowly courts recognized the same psychological bond forged between a child and non-legal parent or family member could be forged between a child and his or her homosexual co-parents.<sup>46</sup> Courts also began to acknowledge a party's ability to parent his or child bore no relation to his or her sexuality.<sup>47</sup> This trend of a more liberal approach towards homosexual co-parents has slowly transformed into today's "child-centered, evidence based approach" to the psychological parent doctrine, which ignores the sexual preference of the parent in question and instead favors an "individualized assessment of the child's best interests" in relation to the non-legal parent in question.<sup>48</sup> Although judicial responses towards homosexual co-parents seeking child custody or

---

42. *In re Hirenia C.*, 22 Cal. Rptr. 2d 443, 449 (Ct. App. 1993); *E.N.O.*, 711 N.E.2d at 892-93; *Lynda A.H. v. Diane T.O.*, 673 N.Y.S.2d 989, 990 (App. Div. 1998).

43. *See A.C. v. C.B.*, 829 P.2d 660, 665 (N.M. Ct. App. 1992) (recognizing that an individual may "be able to establish deprivation of a legally recognized right to maintain some type of continuing relationship with the child" even though they share no legal ties).

44. *See generally In re Hirenia C.*, 22 Cal. Rptr. 2d 443 (Ct. App. 1993); *Gestl v. Frederick*, 754 A.2d 1087 (Md. Ct. Spec. App. 2000); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *A.C.*, 829 P.2d at 664-65.

45. *See Kazmierazak v. Query*, 736 So.2d 106, 106 (Fla. Dist. Ct. App. 1999); *Liston v. Pyles*, No. 97APF01-137, 1997 WL 467327, at \*1 (Ohio Ct. App. Aug. 12, 1997).

46. *See Kendell*, *supra* note 5.

47. *Nadler v. Superior Court*, 63 Cal. Rptr. 352, 354 (Ct. App. 1967) (determining a parent could not be labeled unfit based on her or her sexuality).

48. *Kendell*, *supra* note 5.

visitation rights under the psychological parent doctrine “have improved dramatically” since the 1980s and 1990s,<sup>49</sup> jurisdictions today remain split on whether psychological parentage should be granted to former same-sex partners of co-parented children.<sup>50</sup>

Those in favor of extending the psychological parent doctrine to homosexual co-parents recognize the unusual and extraordinary circumstances that surround the homosexual child-rearing process and understand a bond can be forged between a homosexual parent and a child regardless of whether those parties share genetic or legal ties.<sup>51</sup> Further, proponents acknowledge “interaction, companionship, interplay, . . . mutuality” and fulfillment of a “child’s emotional and financial [needs]” should be at the forefront of a custodial court’s legal determination, and outweigh any social, moral, or political considerations.<sup>52</sup> Additionally, it may be argued homosexual couples should not be “forced” to adopt their children, and treating homosexual families different inadvertently punishes the very children the judicial system seeks to protect.

Those opposing the extension of the psychological parent doctrine to same-sex couples may present four main arguments. First, it may be urged extension of the psychological parent doctrine to homosexual couples presents a slippery slope<sup>53</sup> because it implies parental rights can be received merely through the establishment of an emotional relationship between a non-parent and a child.<sup>54</sup>

---

49. *Id.*

50. See *V.C. v. M.J.B.*, 758 A.2d 539, 550-51 (N.J. 2000). See also *T.B. v. L.R.M.*, 753 A.2d 873, 889-91 (Pa. Super. Ct. 2000) (granting psychological parentage or discussing concepts surrounding the psychological parentage).

51. JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 9 (1996) (“Unlike adults, children have no psychological conception of blood-tie relationships until quite late in their development . . . [w]hat matters to them is the pattern of day-to-day interchanges with the adults who take care of them and who, on the strength of such interactions, become parent figures to whom they are attached.”); see also *V.C.*, 758 A.2d at 550-51.

52. *Clifford K. v. Paul S.*, 619 S.E.2d 138, 157 (W. Va. 2005).

53. See Emmalee M. Miller, *Are you my Mother? Missouri Denies Custodial Rights to Same-Sex Parent*, 75 MISSOURI L. REV. 1377, 1407 (2010).

54. See *Colorado Court Vacates (For Now) Trial Court Order That Prohibits A Mother From Exposing Her Child To “Homophobic” Religious Upbringing Or*

Under this notion, custodial rights may be granted to distant relatives, neighbors, family friends or babysitters. Second, it may be argued placing a child in a single family home with a non-biological relative when a biological or legally related relative is available is “anti-family.”<sup>55</sup> Third, it may be believed the doctrine of the psychological parent infringes upon the “constitutional right [of legal parents] to direct the upbringing of their children.”<sup>56</sup> Last, it may be proposed that it is solely within the province of the legislature, and not that of the judiciary, to extend custodial rights to homosexual co-parents.<sup>57</sup> In accordance with this belief, because it is the legislature and not the judiciary’s responsibility to create protection for homosexual parents, the court cannot carve out exceptions for same-sex couples absent legislative direction.

Although a court may extend the doctrine of the psychological parent to encompass homosexual parents, the majority of jurisdictions consider the doctrine itself and the individual receiving parentage under it subordinate to the legal parent.<sup>58</sup> As such, even if the non-legal parent is able to establish status as the child’s psychological parent, he or she may still be denied all custody rights. This narrow interpretation of the psychological parent is not uniform across the nation, and states such as New Jersey hold that once a party is deemed a child’s psychological parent, he or she must be considered as one in parity with the child’s legal parent.<sup>59</sup> Once both parents are deemed equal in the eyes of the law, the court will then settle questions of

---

*Training*, LIBERTY COUNSEL (Jul. 1, 2004), <http://www.lc.org/pressrelease/2004/nr070104.htm>.

55. See *Clifford K.*, 619 S.E.2d at 161 (Maynard, J., dissenting).

56. See Lindsay J. Rohlf, Note, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define “Parent”?*, 94 IOWA L. REV. 691, 710 (2009) (advocating for the rejection of the Psychological Parent doctrine as applied to non-legal parents).

57. See *id.* at 701.

58. See *Dehar v. Dehar*, 521 N.Y.S.2d 335, 336 (App. Div. 1987) (finding that psychological parenthood alone is not sufficient to constitute an “extraordinary circumstance” warranting a grant of custody to biological mother’s former same-sex partner); *Cox v. Cox*, 2000 ND 44, 613 N.W.2d 516, 521.

59. See *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000).

custody on the basis of the best interest of the child standard.<sup>60</sup>

### III. COURTS' INTERPRETATION OF THE PSYCHOLOGICAL PARENT

The approach courts rely on to determine custodial disputes between legal and non-legal homosexual parents is reasonably untested and varied across the nation. Because of this lack of uniformity amongst the judicial system, state courts differ in their interpretation of the psychological parent doctrine as applied to homosexual couples. This section analyzes various decisions reached by state courts after application of the psychological parent doctrine, and recognizes while some states abide by the psychological parent doctrine in granting homosexual co-parents custodial rights, other jurisdictions maintain the traditional notion that biological ties are the ultimate determinative factor when determining the custody of a child.

#### A. *Courts Awarding Visitation or Custody to the Psychological Parent*

In the following cases, the court granted the non-legal, homosexual co-parent standing under the "exceptional circumstances" doctrine to seek joint legal custody of the party's children on the basis that he or she was determined to be the child's psychological parent. In rendering their decisions these courts excluded sexuality as a factor and looked primarily to the relationship the non-legal parent maintained with the child. Each court also took into consideration independent factors, such as the potential emotional harm to the child, the burden to the non-legal parent, whether a separate written agreement was made between the parties pertaining to child custody/visitation matters, and the intention of both parents at the time the child was conceived or adopted, before determining the best interest of the child was satisfied through continued relationship with both parents.

One of the first cases to apply the psychological parent doctrine to homosexual parents was *In re Pearlman*.<sup>61</sup> In its unpublished 1989 decision, Judge Robert C. Scott granted

---

60. *See id.*

61. *See In re Pearlman*, 15 Fam. L. Rep. (BNA) 1355 (1989) (Fla. Cir. Ct.).

custody to the former same-sex partner of the child's deceased mother over that of the child's legal maternal grandparents.<sup>62</sup> In arriving at its decision, the court deemed the non-legal mother a "psychological parent" and found that as the child's psychological parent, her liberty interest would be violated if the child were to be adopted without her consent.<sup>63</sup> The court also recognized and took into consideration the detrimental affect separation from the non-legal parent would have on the child's physical and emotional wellbeing.<sup>64</sup>

The child's emotional wellbeing was at the forefront of a 2004 decision by the Colorado Court of Appeals, which granted visitation to a non-legal parent on the basis of psychological parentage.<sup>65</sup> In *In re E.L.M.C.*,<sup>66</sup> a former domestic partner petitioned the Colorado District Court for equal parenting time with the child's adoptive mother. In granting the former partner title as the child's psychological parent, the court recognized the existence of a compelling state interest in preventing emotional harm to the child, which, it held, outweighed any potential detriment the legal parent would ensue.<sup>67</sup> In reaching its decision, the court relied upon a four-prong test set forth in *In re Custody of H.S.H.-K*<sup>68</sup> for determining whether a psychological parent relationship could exist between a child and her non-legal homosexual parent.<sup>69</sup> This test required: (1) that the legal parent consented to and fostered the parental relationship between the non-legal parent and the child; (2) that the non-legal parent and child co-habited as a single family unit; (3) that the non-biological parent assumed parental obligations by taking on significant responsibility for the care, education, and development of the child; and (4) that a

---

62. *Id.*

63. *Id.*

64. *Id.*

65. *In re E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004).

66. *Id.*

67. *Id.* at 556.

68. *Holtzman v. Knott (In re custody of H.S.H.-K)*, 533 N.W.2d 419, 421 (Wis. 1995).

69. *Id.* at 560.

bonded, dependent relationship existed between the non-legal parent and the child.<sup>70</sup>

The four-pronged test established in *In re Custody of H.S.H.-K.* has also set the standard in the state of Maryland for determining whether an individual may receive custodial rights as a de-facto/psychological parent. In *S.F. v. M.D.*,<sup>71</sup> a case of first impression in the state of Maryland, the state's highest court determined a non-legal parent who agreed with her former partner to have a child, cared for the child as if she biologically bore ties to the child, resided with the child, and forged a parent-child like bond with the child satisfied the four-pronged test. Because all four elements set forth in *In re Custody of H.S.H.-K.* were established, she would automatically receive standing to assert a right to obtain visitation with the child, and would not be required to show parental unfitness of the legal mother or exceptional circumstances warranting an order of joint custody.<sup>72</sup>

In *Antonucci v. Cameron*,<sup>73</sup> the court discussed whether visitation should be awarded to a non-legal homosexual parent who assisted in raising the child her former partner adopted during their relationship. Although Texas law only permitted one of the women to legally adopt the child, the non-legal parent resided with the child for approximately three and one half years, assisted in the adoption process as much as legally possible, and was consulted by the legal parent in all child-rearing decisions.<sup>74</sup> In awarding the non-legal parent regular visitation with the child, the court determined that it would be in the child's best interest to continue furthering the ties between that child and the non-

---

70. *Id.* at 421.

71. See *S.F. v. M.D.*, 751 A.2d 9, 15, 17 (Md. 2000), *overruled by* *Janice M. v. Margaret K.*, 948 A.2d 73, 87 (Md. 2008).

72. See *S.F.*, 751 A.2d at 19. Although the court determined the non-legal parent would have standing to seek visitation of the child, visitation was denied on the basis that visitation between the child and the non-legal parent resulted in significant behavioral problems for the child, and when visitation was terminated in its entirety, the child's behavioral problems ceased. *Id.* at 19.

73. *Antonucci v. Cameron*, No. FA 980420247, 1999 WL 793974, at \*2 (Conn. Super. Ct. Sept. 24, 1999).

74. See *id.*

legal parent regardless of the fact that she bore no legal ties to the child.<sup>75</sup>

In awarding a non-legal parent, Carol Chambers, visitation, and forcing her to pay mandatory child support to her former lesbian partner, Karen, the Delaware Family Court in 2002 determined the non-legal parent should be considered a “parent” due to the fact that her actions led to the child’s conception.<sup>76</sup> In arriving at its decision, the Court examined the circumstances predating conception and implied psychological parentage was forged in the events before conception due to the fact that when the couple decided to have a child together through artificial insemination, Carol funded a portion of the fertilization process and signed the embryo transfer form.<sup>77</sup> The Court further noted although Carol did not contribute biologically to the child’s birth, her actions, coupled with the parties’ shared intent to conceive a child together, “constituted a symbolic act of procreation”<sup>78</sup> justifying at its minimum, visitation rights and an obligation of child support to the child they theoretically conceived together. The court reasoned, “[h]ad Karen and Carol not acted in tandem, David never would have been conceived.”<sup>79</sup>

The Supreme Court of New Jersey also granted visitation rights to the former same-sex domestic partner of the children’s biological mother in *V.C. v. M.J.B.*<sup>80</sup> under a similar framework. In identifying the non-legal partner as the child’s psychological parent, the court stated,

A psychological parent-child relationship that is voluntarily created by the legally recognized parent may not be unilaterally terminated after the relationship between the adults end...the ending of the relationship between the legal parent and the third party does not end the bond that

---

75. *See id.* at \*3-4.

76. *Chambers v. Chambers*, No. CN00-09493, 2002 WL 1940145, at \*10 (Del. Fam. Ct. Feb. 5, 2002).

77. *See id.* at \*1, \*10.

78. *Id.* at \*10.

79. *Id.*

80. *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000).



the legal parent fostered and that actually developed between the child and the psychological parent.<sup>81</sup>

The court recognized a requirement of unfitness should not be a condition precedent to awarding custody to the non-legal parent, and noted under the "exceptional circumstances" doctrine, the legal parent qualified as a statutory parent even though the legal parent was fit and involved in her children's lives.<sup>82</sup> Moreover, the court distinguished the difference between the role of a non-legal homosexual parent and the role of a nanny or a babysitter, highlighting that a key factor to the creation of a psychological relationship is the legal parent's fostering of the non-legal parent's relationship with the child.<sup>83</sup> The emphasis of this requirement puts to rest critics arguments that including non-legal parents as potential contenders for child custody will create a slippery slope. Under this framework, only individuals who have agreed with the biological parent to stand as a second parent will be able to claim the title of psychological parent. As such, the doctrine of the psychological parent will no longer be made applicable to part-time visitors, nannies or babysitters. The New Jersey Supreme Court also expanded upon the rights given to the psychological parent, stating denying a child's psychological parent visitation rights is "such an extraordinary proscription that it should be invoked *only* in those exceptional cases where it clearly and convincingly appears that the granting of visitation will cause physical or emotional harm to the children"<sup>84</sup>

In *E.N.O. v. L.M.M.*,<sup>85</sup> the Massachusetts Supreme Court upheld the trial court's order granting a child's non-legal parent visitation rights on the ground that she was considered the child's "de facto" parent. In rendering its opinion, the court considered the thirteen-year relationship between the parties, the fact that both parties planned the pregnancy, the role the non-legal parent played in the child's life, and the connection between the non-legal parent and the child, acknowledging the child referred to his non-

---

81. *Id.* at 552.

82. *See id.* at 549, 553-54.

83. *See id.* at 552.

84. *Id.* at 554-55 (citation omitted).

85. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 886 (Mass. 1999).

legal parent as “Mommy” and told his classmates that he had “two mothers.”<sup>86</sup> The court also established a balancing test, stating it must balance the legal mother’s interest in maintaining sole custody of her child against the child’s interest in continuing his relationship with his non-legal parent.<sup>87</sup> When compared to the loss the child would suffer, the court stated, the intrusion on the legal parent’s interest was “minimal.”<sup>88</sup>

In the *Matter of T.L.*, the court recognized the judiciary must evolve with the “social fragmentation and myriad configurations of the modern family.”<sup>89</sup> In granting the former same sex partner of the child’s legal parent reasonable visitation of their two-year old child, the court acknowledged “custody and visitation disputes no longer occur solely between heterosexual couples,” and must be resolved in a way that considers the best interest of the child, regardless of whether that meets traditional family standards.<sup>90</sup> The term “family,” the court explained, means a “continuing relationship of love and care, and an assumption of responsibility for some other person”<sup>91</sup> regardless of the sexuality of the parties. Further, the court emphasized it could not deprive a child of his non-legal parent strictly because that parent pursued a lifestyle that was “at odds with the norm.”<sup>92</sup> Balancing the legal-parent’s right to control the child with the state’s *parens patriae* interest in the child’s welfare, the court awarded the non-birth mother extensive visitation and the right to participate in all major life decisions affecting the child on the basis that the “needs of the minor child for a continuing relationship with each parent” significantly outweighed any burden that may occur to the legal-parent.<sup>93</sup>

---

86. *Id.* at 889.

87. *See id.* at 893-94.

88. *Id.*

89. *In re T.L.*, No. 953-2340, 1996 WL 393521, at \*2 (Mo. Cir. May 7, 1996).

90. *Id.*

91. *Id.* (citation omitted).

92. *Id.* at 4 (citation omitted).

93. *Id.* at 5-6.

The Delaware Family Court in *In re Hart*<sup>94</sup> applied this notion to two homosexual fathers in determining whether the non-legal father had standing to adopt the couple's two sons. In holding it was in the best interest of the children to permit both parents to retain legal standing, the court argued any other decision would be "absurd, unreasonable, and unnecessary"<sup>95</sup> regardless of the sex of the parents or the rights awarded to same-sex couples within the state of Delaware.

In 2005, the Washington Supreme Court awarded a homosexual co-parent standing to petition for status as a *de facto* parent.<sup>96</sup> Despite denying her petition for visitation, the Court recognized its authority to adapt common law to fill gaps in existing Washington statutes and emphasize the best-interests-of-the-child-standard when evaluating visitation petitions<sup>97</sup> by essentially concluding de-facto parents are equal to legal-parents, and both the de-facto and biological parent have a "fundamental liberty interest[]" in the 'care, custody, and control' of [the child in question]."<sup>98</sup>

In a 54-page opinion and six to one ruling, the Supreme Court of Montana, on October 6, 2009, awarded joint custody of two children to the non-biological partner of the children's birth mother.<sup>99</sup> After their ten-year lesbian relationship concluded in 2006, Maniaci, the children's birth mother, married a man and cut off all ties between her former partner, Kulstad, and their children.<sup>100</sup> In labeling Kulstad the children's "psychological parent," the court identified her as a "loving and stable force in the children's lives"<sup>101</sup> which justified the award of joint custody on the

---

94. *In re Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2001).

95. *Id.* at 1182.

96. *Carvin v. Britain (In re Parentage of L.B.)*, 122 P.3d 161, 175-177 (Wash. 2005).

97. *Id.* at 172-73.

98. *Id.* at 178 (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

99. *Kulstad v. Maniaci*, 2009 MT 326, 220 P.3d 595.

100. Killian Melloy, *ACLU, Gay Couples Sue Montana for Discrimination*, BOSTON EDGE (Jul. 23, 2010), <http://www.edgeboston.com/index.php?ch=news&sc2=news&sc3=&id=108380>; *Protecting Parenthood*, DAILY INTERLAKE (Apr. 19, 2009, 1:00 am), [http://www.dailyinterlake.com/opinion/columns/article\\_5036cffb-8a84-57bf-8414-0ebb33969fbf.html](http://www.dailyinterlake.com/opinion/columns/article_5036cffb-8a84-57bf-8414-0ebb33969fbf.html).

101. *Kulstad*, 220 P.3d 595 at 600-01.

basis that removal of this stable force would go against the best-interests-of-the-child standard recognized in Montana.<sup>102</sup> In his concurring opinion, Judge Nelson elaborated, “[n]aming it for the evil it is, discrimination on the basis of sexual orientation is an expression of bigotry. Lesbian and gay Montanans must not be forced to fight to marry, to raise their children, and to live with the same dignity that is accorded heterosexuals.”<sup>103</sup>

*B. Courts Failing to Award Visitation or Custody to Psychological Parent*

In the cases below, the court applied the de facto parent or psychological parent doctrine and determined while a psychological bond had been formed between the child and his non-legal parent, an award of child visitation rights to the partner was not supportable. In granting their decisions, these courts took into consideration the statutory scheme of the state and the fitness of the legal-parent to continue parenting. These courts also found consensual child rearing between homosexual couples was not an extraordinary circumstance that warranted additional protection of the relationship between the non-legal parent and the child, or also held a private contractual agreement between homosexual partners to rear a child would not withstand judicial scrutiny and could not be upheld under the laws of that particular state.<sup>104</sup>

New York was one of the first states to severely restrict the rights of homosexual psychological parents. In *Dehar v. Dehar*,<sup>105</sup> the Appellate Division reversed the lower court’s determination that the child’s non-legal parent should be granted custodial rights on the basis that he was the child’s psychological parent.<sup>106</sup> In reaching its decision, the court

---

102. *Id.* at 601.

103. *Id.* at 611 (Nelson, J., concurring).

104. *Wakeman v. Dixon*, 921 So.2d 669 (Fla. Dist. Ct. App. 2006) (finding a private agreement between a lesbian couple providing for visitation by the non-biological mother unenforceable on the basis that parental rights, unlike constitutional rights, cannot be waived or interfered with in this way—referring to the rights of the biological parent).

105. *Dehar v. Dehar*, 521 N.Y.S.2d 335, 336 (App. Div. 1987).

106. *See id.* at 657.

noted psychological parenthood did not, by itself, justify an extraordinary circumstance warranting a grant of visitation or custody to the former partner of the child's biological mother.<sup>107</sup> Moreover, the court maintained a narrow view of those eligible to receive custody, and noted all claims by non-legal parents would be insufficient when the right of the natural parent to full custody of the child remains undisputed.<sup>108</sup> The court also expressed boundaries given to a psychological parent, stating "extraordinary circumstances" justifying the removal of a child from his legal parent occur only when the legal parent surrenders, neglects or abandons the child, is determined to be unfit, or when an "unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance [occurs] which would drastically affect the welfare of the child."<sup>109</sup>

Today, New York still refuses to recognize the role of the psychological parent when determining child custody. In its most recent published opinions,<sup>110</sup> the New York Court of Appeals determined a non-legal parent of a same-sex couple may not sue for custody or visitation absent the presence of a second parent adoption. New York, however, will apply the rules of comity and recognize all parentage created by civil unions outside the state without taking into consideration if a psychological relationship has been created between the child and the non-legal parent.<sup>111</sup>

Despite arguments from the non-legal parent that an implied oral contract existed between her and the child's biological mother to undertake shared responsibilities in raising the child the couple created through artificial insemination, the Supreme Judicial Court of Massachusetts in *T.F. v. B.L.*<sup>112</sup> determined although an implied agreement existed between a homosexual couple to "create a child"<sup>113</sup>

---

107. *Id.*

108. *See id.*

109. *Id.* (quoting *Bennett v. Jeffreys*, 40 N.Y.2d 543, 549 (1976)).

110. *See Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010).

111. Arthur S. Leonard, *New York Court of Appeals Rules in Lesbian Custody and Child Support Disputes*, LESBIAN/GAY LAW NOTES 79 (June 2010), [http://www.nyls.edu/user\\_files/1/3/4/30/59/65/66/ln1006.pdf](http://www.nyls.edu/user_files/1/3/4/30/59/65/66/ln1006.pdf).

112. *T.F. v. B.L.*, 813 N.E.2d 1244, 1254 (Mass. 2004).

113. *Id.* at 1246.

prior to that child's conception, "parenthood by contract" was not the law of Massachusetts,<sup>114</sup> and as such any agreement between a legal and non-legal parent to raise a child would be "unenforceable as against public policy." In denying T.F. status as the child's de-facto or psychological parent, the court took into consideration the fact she had not maintained a long-term relationship with the child since the couple had separated prior to the child's birth, and that the child had never resided with T.F.<sup>115</sup> The court also acknowledged T.F.'s name did not appear on the birth certificate, T.F. had not legally adopted the child, and T.F. only made one financial contribution towards the child after his birth.<sup>116</sup>

The Supreme Court of Wisconsin in *In re Custody of H.S.H.-K.*,<sup>117</sup> in the context of custody and visitation rights, evaluated a ten-year relationship between a lesbian couple that, after exchanging vows in a commitment ceremony, determined they wanted to have a child via artificial insemination.<sup>118</sup> Although the partner was present during the child's birth and provided the primary financial support for the family during the child's life,<sup>119</sup> the court determined she would be unable to bring forth an action to obtain custody or visitation rights of the child once the parties had separated. In making its decision, the court stated a person who had not been legally related to the child could not retain standing absent compelling circumstances.<sup>120</sup> Compelling circumstances did not include the fact that the parties were both homosexuals, or mutually agreed to co-parent a child.<sup>121</sup>

---

114. *Id.*

115. *Id.* at 1247-48, 1253.

116. *Id.* at 1248.

117. *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419, 421 (Wis. 1995).

118. *Id.*

119. *Id.* at 421-22, 437.

120. *Id.* at 423

121. *See id.* at 424. Note also that the court remanded the case to the trial court to determine if the non-legal parent has met the requirements of the four-prong test.

That same year, in *Music v. Rachford*, the Florida District Court of Appeals refused to acknowledge a former same-sex partner as a *de facto* parent, despite her participation in prenatal classes, her presence during the child's birth, and the child's use of her surname.<sup>122</sup> The Court further stated that a homosexual non-legal parent could not achieve standing on par with that of the child's biological mother, even if deemed a *de facto* parent.<sup>123</sup>

Four years later, the Florida Court of Appeals in *Kazmierazak v. Query*<sup>124</sup> determined the child's legal parent retained a superior right to that of the non-legal parent. Due to this inferiority, the court held psychological parents would be unable to achieve standing in custody disputes against the child's biological or adoptive parent.<sup>125</sup> In rendering its pronouncement, the court declared it was beyond the power of the judiciary to interfere with the right of a child's legal parent to control the upbringing of his or her child absent a showing of "demonstrable harm to the child."<sup>126</sup> The court further noted the concept of *in loco parentis* is only applicable to those in legally recognized marriages.<sup>127</sup> Thus, since homosexual marriage is not recognized within the state of Florida, even if a homosexual co-parent is able to demonstrate status as a child's psychological parent, he or she would be unable to seek protection under Florida law.

One year later, the Utah Supreme Court examined whether a law should be established to grant standing to former domestic partners of fit legal parents.<sup>128</sup> In responding in the negative, the court placed significant weight on the authority of the child's legal parent, noting, "in carving out a permanent role in the child's life for a surrogate parent, the court would necessarily subtract from the legal parent's right to direct the upbringing of [the]

---

122. *Music v. Rachford*, 654 So.2d 1234, 1234-35 (Fla. Dist. Ct. App. 1995).

123. *Id.* at 1235.

124. *See Kazmierazak v. Query*, 736 So.2d 106, 106 (Fla. Dist. Ct. App. 1999).

125. *See id.* at 109.

126. *Id.* at 107.

127. *Id.* at 110 (citing to *Albert v. Albert*, 415 So.2d 818, 820 (Fla. Dist. Ct. App. 1982); *Taylor v. Taylor*, 279 So.2d 364 (Fla. Dist. Ct. App. 1973).

128. *See Jones v. Barlow*, 2007 UT 20, 154 P.3d 808.

child.”<sup>129</sup> The court also stated the term “psychological parent” raises concerns among the judiciary in the sense that legal parents may be deprived of their innate and legal custodial rights on the basis of “elusive factual determinations.”<sup>130</sup> In arriving at its opinion, the court emphasized the importance of common law precedent, highlighting that a court may not make a best interests of the child inquiry of the non-legal parent “absent a determination that the legal parent [is] unfit.”<sup>131</sup>

Holding former same-sex partners were not considered parents in the eyes of the state legislature, the Tennessee Appellate Court in *In re Thompson*<sup>132</sup> determined that despite the psychological attachment forged between the child and the non-legal parent, the term “parent” must be narrowly construed when the interest of a child is at stake. As such, “parent” encompassed only those who maintained a “biological, legal, [or] adoptive” relationship with the child.<sup>133</sup>

In rejecting the doctrine of the psychological parent on the basis it would expose parents to “a potentially wide range of third parties claiming a parent-like relationship with their child,”<sup>134</sup> the Vermont Supreme Court in *Titchenal v. Dexter*<sup>135</sup> denied a non-legal parent standing to seek visitation rights of the child she helped raise, and her former partner adopted. Although the court acknowledged the disintegration of the nuclear family and the public-policy considerations which favor allowing third parties to seek court-compelled child contact under the doctrine of the psychological parent, it determined these considerations were not compelling enough to require it to “acknowledge that de facto parents have a legally cognizable right to parent-child contact”<sup>136</sup> and instead insisted the

---

129. *Id.* at 816.

130. *Id.* (citation omitted).

131. *Id.* at 818 (citing to *In re Adoption of P.N.*, 2006 UT 64, 148 P.3d 927, 929); *In re J.P.*, 648 P.2d 1364, 1368-69 (Utah 1982)).

132. *In re Thompson*, 11 S.W.3d 913, 918-19 (Tenn. Ct. App. 1999).

133. *Id.* at 918.

134. *Titchenal v. Dexter*, 693 A.2d 682, 688-90 (Vt. 1997).

135. *Id.*

136. *Id.* at 689.



"[l]egislature [would be] better equipped to deal with the problem."<sup>137</sup> According to the court, when homosexual co-parents choose to not partake in a second-parent adoption of the child they intend to raise together, the non-legal parent forfeits any subsequent right to seek custody or visitation should dissolution of the couple's relationship occur, since an "adequate remedy at law" existed, and the couple chose to not take advantage of it.<sup>138</sup>

The Illinois Appellate Court in *In re the Matter of Visitation with C.B.L.*<sup>139</sup> denied the petition for visitation by a woman who jointly with her ex-partner planned for and raised the couple's one and a half year old child. A.B., C.B.L.'s non-legal parent, sought visitation with C.B.L. pursuant to section 607 of the Illinois Marriage and Dissolution of Marriage Act<sup>140</sup> and on the basis that she was C.B.L.'s de facto parent, after the dissolution of her relationship with H.L. Prior to C.B.L.'s birth, A.B. and H.L. had been in a committed eight-year relationship and equally agreed to raise a child H.L. would conceive through artificial insemination.<sup>141</sup> In rejecting A.B.'s claim of psychological parentage, the court reasoned a statute which concerns an area formerly covered by common law, such as section 607 of the Marriage Act "should be construed as adopting the common law unless there is clear and specific language showing a change in the common law was intended by the legislature."<sup>142</sup> As the Illinois legislature had yet to indicate or submit demonstrable proof that homosexual non-legal parents should be encompassed within section 607, it can be inferred the court determined psychological parentage could not be awarded to the non-legal parent, regardless of any attachment between that adult and child on this basis.<sup>143</sup>

---

137. *Id.*

138. *See id.* at 686-87.

139. *In re Visitation with C.B.L.*, 723 N.E.2d 316, 320-21 (Ill. App. Ct. 1999).

140. *Id.* at 317-18.

141. *Id.* at 317.

142. *Id.* at 318 (citing to *Proud v. W.S. Bills & Sons, Inc.*, 255 N.E.2d 64 (Ill. Ct. App. 1970)).

143. *In re Visitation with C.B.L.*, 723 N.E.2d at 318-21.

More recently, on June 3, 2008, the Court of Appeals in Richmond, Virginia revisited the concept of the psychological parent in *Stadter v. Spierko*.<sup>144</sup> Arguing she was a “person of legitimate interest” pursuant to Virginia code §20-124.1, Stadter submitted she should receive either joint custody or visitation rights to the four year-old child she and her former partner planned and raised together since the child’s 2003 birth.<sup>145</sup> Throughout Spierko’s artificially inseminated pregnancy, Stadter assisted in parental expenses and responsibilities and was present for the child’s birth.<sup>146</sup> Stadter and Spierko both gave the child a hyphenated form of their last names and equally shared child-parenting responsibilities; Spierko was the primary care provider, while Stadter provided the child with substantial financial support.<sup>147</sup> Although expert and lay testimony demonstrated a forged attachment between the child and Stadter and that the child would benefit from continuing interaction<sup>148</sup> with Stadter, visitation and joint custody was denied on the basis that Stadter failed to present evidence demonstrating the child would be harmed if visits with Stadter<sup>149</sup> were discontinued. In upholding the denial for Stadter’s petition for visitation rights, the Virginia Court of Appeals recognized, “the right of parents in raising their child is a fundamental right protected by the Fourteenth Amendment,”<sup>150</sup> and there was “no reason for the State to inject itself into the private realm of the family” unit when a court determined that the child’s legal-parent was fit.<sup>151</sup> Further, visitation would only be awarded to a non-legal parent “in contravention of a fit parent’s expressed wishes only when justified by a compelling state interest,”<sup>152</sup> such as demonstrative evidence the child would suffer actual harm if visitation rights would be denied.

---

144. *Stadter v. Siperko*, 661 S.E.2d 494, 498 (Va. Ct. App. 2008).

145. *Id.* at 496.

146. *Id.*

147. *Id.*

148. *Id.* at 497.

149. *Id.*

150. *Id.* (quoting *Williams v. Williams*, 485 S.E.2d 651, 654 (Va. Ct. App. 1997)).

151. *Id.* (citing *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000)).

152. *Id.* at 497-98.

Again, since Stadter could not provide 'sufficient evidence' for the court to conclude the child would suffer actual harm from a lack of visitation by the child's psychological parent, her claim and the psychological parent doctrine were both denied.<sup>153</sup>

IV. COURTS SHOULD AUTOMATICALLY EXTEND APPLICATION OF THE PSYCHOLOGICAL PARENT DOCTRINE TO HOMOSEXUAL CO-PARENTS UNDER THE TERM "OTHER RECOGNIZED GROUNDS" AND APPLY THE *CLARK* TEST TO DETERMINE "PSYCHOLOGICAL PARENTAGE" AMONGST GAY AND LESBIAN PARENTS

A. *The Relationship Between a Homosexual Non-Legal Parent and a Child is an Exceptional Circumstance Warranting Additional Judicial Protection*

The bond forged between a child and his or her homosexual parent is unlike any relationship recognized within our judicial system. It is unique, in the sense that it fails to conform to the traditional family norms of society<sup>154</sup> and leaves bystanders and critics struggling to define its components. In grasping to comprehend this complex relationship, courts and legislatures have subconsciously penalized homosexual parents by prohibiting them from asserting custodial rights of their child, despite any psychological or emotional ties that may have been created. In doing so, courts maximize the detriment a child suffers solely on the basis that he resides in a family that fails to comply with traditional standards.<sup>155</sup> These standards look not to the best interest of the child, but to the best interest of society, and rely on political, social and moral agendas to punish the child based on the sexuality of his parents. A child, like any other citizen, "has rights too, some of which are of a constitutional magnitude."<sup>156</sup> It goes against the

---

153. *Id.* at 498-501.

154. *See In re T.L.*, No. 953-2340, 1996 WL 393521, at \*2 (Mo. Cir. Ct. May 7, 1996) ("Courts must...resolve custody...disputes in a way that minimizes the detriment a child suffers when his emotional bonds do not conform to traditional family norms.").

155. *See id.*

156. *In re Guardianship of Victoria R.*, 201 P.3d 169, 174 (N.M. Ct. App. 2008) (citing *Clifford K. v. Paul S.* 619 S.E.2d 138, 159 (W. Va. 2005)); *see also In re*

best interests of that child to restrict “continued association with those individuals to whom the child has formed an attachment,”<sup>157</sup> regardless of that party’s sexuality.

The determination of what is included as an “exceptional case” for purposes of child custody disputes is “too important to be subjected to a mechanical application of an artificial litmus test containing three factors or two prongs.”<sup>158</sup> In construing same-sex child custody cases as “exceptional case[s]” under the doctrine of the psychological parent, state courts would not be forced to recognize homosexual relationships, but instead, would be prevented from asserting decisions that remain contrary to the best interest of the child. Recognizing same-sex child custody cases as exceptional cases is not inconsistent with state court precedent granting homosexual parents standing as a child’s legal parent,<sup>159</sup> nor is determining that a party may be deemed a child’s psychological parent regardless of that party’s sexuality.<sup>160</sup> Because there is no uniform definition of the term “family,”<sup>161</sup> courts must adopt a more malleable approach in defining who may be considered a “parent” when the safety and happiness of children are at stake.<sup>162</sup> “Treating same-sex couples different[] [from heterosexual couples] not only [ ] harms those individual[] [couples], but also stigmatizes them and their children by deeming them unworthy to enjoy fundamental and equal citizenship

---

Clausen, 502 N.W.2d 649, 669 (Mich. 1993) (citing *Bennett v. Jeffreys*, 356 N.E.2d 277, 281 (N.Y. 1976)); *Johnita M.D. v. David D.D.*, 740 N.Y.S.2d 811, 813-14 (Sup. Ct. 2002) (citing *Bennett*, 356 N.E.2d at 281); *Boisvert v. Harrington*, 796 A.2d 1102, 1108 (Vt. 2002) (citing *Bennett*, 356 N.E.2d at 281).

157. *Snyder v. Scheerer*, 436 S.E.2d 299, 307 (W.Va. 1993).

158. *In re Marriage of Williams*, 90 P.3d 365, 370 (Kan. Ct. App. 2004).

159. See *id.* at 370. See also *V.C. v. M.J.B.*, 748 A.2d 539, 550 (N.J. 2000); *Clifford K. v. Paul S.*, 619 S.E.2d 138, 152-54 (W. Va. 2005) (labeling a dispute concerning a child who has resided in a household of same-sex parents an exceptional circumstance requiring custodial determination to be based on the “best interests of the child” standard).

160. See *In re E.L.M.C.*, 100 P.3d 546, 551 (Colo. App. 2004).

161. See *In re T.L.*, No. 953-2340, 1996 WL 393521 at \*2 (Mo. Cir. Ct. May 7, 1996) (citations omitted).

162. *Id.*

rights.”<sup>163</sup> More important, courts should not retain the discretion to determine “mere blood relations...trump a relationship based upon love and trust.”<sup>164</sup> In implementing this policy, homosexual parents would no longer be forced to adopt their children in order to attain protection from the legal system should dissolution of the co-parenting relationship ensue. Further, parties found to be psychological parents would receive automatic standing to contest matters of child custody, and would no longer risk being deemed subordinate<sup>165</sup> to the legal parent. This notion would be applicable to all parties who have been deemed psychological parents by a court of law.

By labeling the homosexual co-parent relationship an exceptional circumstance and automatically awarding standing to homosexual co-parents under the psychological parent doctrine, courts will also eliminate the opportunity a homosexual legal parent has for forum-shopping. As the laws on gay marriage and child custody are not uniform across the nation, estranged legal-parents may manipulate the judicial system and bring their claim for child custody in a state that historically has proven to be more politically conservative or sympathetic towards the treatment of gay couples in hopes of receiving the decision they desire. In permitting these legal parents to do so, courts allow them to reap the benefits of both sides of the coin; when in a loving homosexual relationship, that party is allowed to find a more liberal state and insist the relationship between the child and non-legal parent is recognized, yet when dissolution of the couple's relationship occurs, that same legal-parent may maneuver the claim into a state that refuses to acknowledge the role of the psychological parent as applied to homosexual co-parents, and thus intentionally destroy the very relationship he or she worked to create, without any thought or concern as to how this negatively impacts the child in question. These individuals “abandon their parental responsibility of putting their children's needs before their own selfish desires to punish a former

---

163. Richard J. Podell, A.B.A. *Section of Individual Rights & Responsibilities: Recommendation*, 111 A.B.A. SEC. INDIV. RIGHTS & RESPONSIBILITIES 4 (2010) (citing *Lawrence v. Texas*, 539 U.S. 558, 576, 578 (2003)).

164. *Clifford K.*, 619 S.E.2d at 163 (Starcher, J., concurring).

165. See *Dehar v. Dehar*, 521 N.Y.S.2d 335, 336 (App. Div. 1987); *Cox v. Cox*, 2000 ND 144, 613 N.W.2d 516, 521-22.

partner at any cost, and in the process are willing to sacrifice vital legal protections for untold numbers of other children with gay or lesbian and/or un-married parents.”<sup>166</sup>

In identifying homosexual co-parents as exceptional circumstances, courts will also be able to treat each child in a similar manner regardless of whether his parents had entered into a marriage or civil union, or were unable to do so under the laws of the state where they reside. The distinction between whether an individual should be deemed a parent in the eyes of the law should not be based on whether a “couple in a civil union or not in a civil union...From the child’s point of view, he or she has two parents.”<sup>167</sup> In stripping a child from his or her psychological parent based on the legal status of the parent’s relationship, courts are punishing a child for something out of his or her control and putting social and political agendas before what truly lies in the child’s best interest.

*B. The Four-Pronged In re Custody of H.S.H.-K. Test Must Be Applied to Define “Psychological Parent” so Over Inclusiveness Does Not Occur*

Critics are reluctant to grant homosexual non-legal parents automatic standing as psychological parents on the ground that this will provide an outlet for any individual to relinquish custody from fit legal parents, regardless of that individual’s ties to the child.<sup>168</sup> As such, they contest nannies, godparents, neighbors, or distant relatives would be able to obtain custodial rights under the “psychological parent doctrine” so long as they attained a close psychological connection with the child.<sup>169</sup> To eliminate this fear, I encourage courts to apply the four-factor test set forth in *In re Custody of H.S.H.-K* to determine who may be

---

166. *Gay v. Gay Custody Battles*, LAMBDA LEGAL, [www.lambdalegal.org/news/of-counsel/oc\\_200909\\_camilla-feature.html](http://www.lambdalegal.org/news/of-counsel/oc_200909_camilla-feature.html).

167. Peters, *supra* note 17, at A26 (quoting American University Professor Nancy Polikoff).

168. See *Jones v. Barlow*, 2007 UT 20, 154 P.3d 808, 816.

169. *Id.* (citing *State ex rel J.W.F.*, 799 P.2d 710, 715 n.5 (Utah 1990)).

considered a psychological parent.<sup>170</sup> Since its inception, this test has been the primary method used by state and federal courts to determine the application of the psychological parent doctrine to homosexual co-parents.<sup>171</sup> In incorporating this test into its analysis, courts will ensure the protection granted to non-biological parents remains strictly limited in nature.<sup>172</sup> The first element of this test requires the child's legal parent to consent to and foster the relationship between the child and the non-legal parent.<sup>173</sup> This element behaves in an estoppel manner, and prevents the legal parent from eliminating the relationship "which she voluntarily created and actively fostered simply because after the party's [sic] separation she regretted having done so."<sup>174</sup> It also serves as concrete evidence of the legal parent's distribution of parental authority and autonomy to the non-legal parent<sup>175</sup> and demonstrates intent to transform sole custodial responsibilities into joint custodial responsibilities. The three additional requirements: that the non-legal parent and child cohabited as a single family unit; that the non-biological parent assumed parental obligations by taking on significant responsibility for the care, education, and development of the child, and that a bonded, dependent relationship existed between the non-legal parent and the child, combat the concern that unreasonable intrusions will be made into the legal parent's custodial rights by nannies, babysitters and close family friends.<sup>176</sup>

Further, a non-legal parent may be able to establish deprivation of a legally recognized right to maintain a relationship with the child absent showing of parental unfitness on behalf of the child's legal parent.<sup>177</sup> Although

---

170. *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419, 421 (Wis. 1995).

171. *In re E.L.M.C.*, 100 P.3d 546, 550 (Colo. App. 2004); *V.C. v. M.J.B.*, 748 A.2d 539, 550-53 (N.J. 2000); *Rubano v. DiCenzo*, 759 A.2d 959, 974 (R.I. 2000).

172. *In re E.L.M.C.*, 100 P.3d at 560.

173. *Id.*

174. *Id.* (quoting *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1322 (Pa. Super. Ct. 1996)).

175. *See V.C.*, 748 A.2d at 552.

176. *In re E.L.M.C.*, 100 P.3d at 560.

177. *See Liston v. Pyles*, No. 97APF01-137, 1997 WL 467327, at \*8 (Ohio Ct. App. Aug. 12, 1997).

“the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”<sup>178</sup> a parent’s right to control his child is not absolute<sup>179</sup> and a legislative enactment may be viewed as permissible so long as it is “necessary to promote a compelling state interest and does so in the least restrictive manner possible.”<sup>180</sup>

Labeling the psychological parent child relationship as an exceptional circumstance recognizes the state’s compelling interest in protecting the wellbeing and happiness of the children that reside within it, while allowing gay and lesbian parents to receive the rights guaranteed to them under the Fourteenth Amendment.<sup>181</sup> The state’s interest extends well beyond the roles of the legal and non-legal parent, and requires the judicial system to protect this relationship despite the desires of the legal parent, so the best interests of the child may be advanced.<sup>182</sup>

Moreover, courts are unable to justify how it would be in the child’s best interest to be removed from two supporting, nurturing and loving parents, and instead placed solely in the custody of one supporting, nurturing and loving parent who is at odds with a party who has welcomed, acknowledged, loved and supported that child since adoption or birth. In unilaterally ripping a child from his or her psychological parent after he or she voluntarily created that attachment, the legal parent has failed to act in the best interest of his or her child and should not be permitted to receive sole custody or singlehandedly control the child’s upbringing absent the consent and support of the child’s psychological parent.

---

178. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

179. *V.C.*, 748 A.2d at 548.

180. *In re Custody of C.M.*, 74 P.3d 342, 344 (Colo. App. 2004).

181. *See Romer v. Evans*, 517 U.S. 620 (1996) (holding gay and lesbians are not excluded from the guarantee of equal protection of the law). *See also Lawrence v. Texas*, 539 U.S. 558 (2003).

182. *See V.C.*, 748 A.2d at 552.



C. *The Legal Parent's Waiver of Familial Privacy Cannot Be Undone*

Although critics urge awarding custody or visitation to a non-legal parent violates the legal parent's right to familial privacy and the right to maintain exclusive control over the child's upbringing, this argument has no merit. When a legal parent encourages or creates a relationship between a non-legal parent and the child, courts must find that the legal parent has waived his or her right to subsequently object to the relationship he or she worked so hard to create. The legal parent and should not later be permitted to show that elimination of the forged relationship would not be detrimental to the wellbeing and mental stability of the child in question.

CONCLUSION

The bond between a parent and a child is not the product of gender, sexual orientation or marital status. It is one generated from the unconditional love, devotion and attention shared between a parent and a child, regardless of that parent's sexual orientation. When this relationship has been created and encouraged by the child's legal parent, it would be detrimental to the health and well-being of the child to permit that parent to unilaterally terminate the relationship at his or her discretion. Extending the application of the psychological parent to homosexual co-parents under the term "other recognized grounds" and applying the *In re Custody of H.S.H.-K.* test to determine psychological parentage amongst gay and lesbian parents, removes the tribunal's focus from the political and moral views of society, and places it where it needs to be: on the best interest of the child.